

## AMERICAN INDIAN RELIGIOUS FREEDOM ACT AMENDMENTS OF 1994

AUGUST 5, 1994.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. MILLER of California, from the Committee on Natural Resources, submitted the following

### R E P O R T

[To accompany H.R. 4230]

[Including cost estimate of the Congressional Budget Office]

The Committee on Natural Resources, to whom was referred the bill (H.R. 4230) to amend the American Indian Religious Freedom Act to provide for the traditional use of peyote by Indians for religious purposes, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

#### SECTION 1. SHORT TITLE.

This Act may be cited as the "American Indian Religious Freedom Act Amendments of 1994".

#### SEC. 2. TRADITIONAL INDIAN RELIGIOUS USE OF THE PEYOTE SACRAMENT.

The Act of August 11, 1978 (42 U.S.C. 1996), commonly referred to as the "American Indian Religious Freedom Act", is amended by adding at the end thereof the following new section:

"SEC. 3. (a) The Congress finds and declares that—

"(1) for many Indian people, the traditional ceremonial use of the peyote cactus as a religious sacrament has for centuries been integral to a way of life, and significant in perpetuating Indian tribes and cultures;

"(2) since 1965, this ceremonial use of peyote by Indians has been protected by Federal regulation;

"(3) while at least 28 States have enacted laws which are similar to, or are in conformance with, the Federal regulation which protects the ceremonial use of peyote by Indian religious practitioners, 22 States have not done so, and this lack of uniformity has created hardship for Indian people who participate in such religious ceremonies;

"(4) the Supreme Court of the United States, in the case of *Employment Division v. Smith*, 494 U.S. 872 (1990), held that the First Amendment does not protect Indian practitioners who use peyote in Indian religious ceremonies, and also raised uncertainty whether this religious practice would be protected under the compelling State interest standard; and

"(5) the lack of adequate and clear legal protection for the religious use of peyote by Indians may serve to stigmatize and marginalize Indian tribes and cultures, and increase the risk that they will be exposed to discriminatory treatment.

"(b)(1) Notwithstanding any other provision of law, the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion is lawful, and shall not be prohibited by the United States or any State. No Indian shall be penalized or discriminated against on the basis of such use, possession or transportation, including, but not limited to, denial of otherwise applicable benefits under public assistance programs.

"(2) This section does not prohibit such reasonable regulation and registration by the Drug Enforcement Administration of those persons who cultivate, harvest, or distribute peyote as may be consistent with the purposes of this Act.

"(3) This section does not prohibit application of the provisions of section 481.111(a) of Vernon's Texas Health and Safety Code Annotated, in effect on the date of enactment of this section, insofar as those provisions pertain to the cultivation, harvest, and distribution of peyote.

"(4) Nothing in this section shall prohibit any Federal department or agency, in carrying out its statutory responsibilities and functions, from promulgating regulations establishing reasonable time limitations on the use or ingestion of peyote prior to performance of official duties by active duty military personnel, sworn law enforcement officers, or personnel directly involved in public transportation or any other safety-sensitive positions where the performance of such duties may be adversely affected by such use or ingestion, nor shall this section prohibit affected departments or agencies from establishing reasonable limitations on the transportation of peyote on military bases or overseas. Such regulations shall be adopted only after consultation with representatives of traditional Indian religions for which the sacramental use of peyote is integral to their practice. Any regulation promulgated pursuant to this section shall be subject to the balancing test set forth in section 3 of the Religious Freedom Restoration Act (Public Law 103-141; 42 U.S.C. 2000bb-1).

"(c) For purposes of this section—

"(1) the term 'Indian' means a member of an Indian tribe;

"(2) the term 'Indian tribe' means any tribe, band, nation, pueblo, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.)), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;

"(3) the term 'Indian religion' means any religion—

"(A) which is practiced by Indians, and

"(B) the origin and interpretation of which is from within a traditional Indian culture or community; and

"(4) the term 'State' means any State of the United States, and any political subdivision thereof.

"(d) Nothing in this section shall be construed as abrogating, diminishing, or otherwise affecting—

"(1) the inherent rights of any Indian tribe;

"(2) the rights, express or implicit, of any Indian tribe which exist under treaties, executive orders, and laws of the United States;

"(3) the inherent right of Indians to practice their religions; and

"(4) the right of Indians to practice their religions under any Federal or State law."

## PURPOSE

The purpose of H.R. 4230 is to amend the American Indian Religious Freedom Act to provide for the traditional use of peyote by Indians for religious purposes, and for other purposes.

## BACKGROUND AND NEED

Peyote, the scientific name of which is *Lophophora williamsii*, is a small, spineless cactus that grows only in the Rio Grande valley of southern Texas and northern Mexico. Anthropologists date the sacramental use of the peyote cactus among indigenous peoples back 10,000 years. Native American religious use of peyote was discovered by Spanish explorers in the 1600's and has continued to the present. Such use exists today, largely through the Native American Church (NAC), among more than 50 Indian tribes in the United States. The NAC is the present-day embodiment of one of the oldest religious traditions in the western hemisphere. The contemporary NAC was first incorporated in Oklahoma in 1918, and now has chapters in 25 States. Approximately 250,000 American Indians are affiliated with the NAC.

The Federal District Court in New Mexico, in the 1986 case of *Toledo v. Nobel-Sysco, Inc.*, 651 F.Supp. 483 (D.N.M. 1986) held that the religious use of peyote was not illegal. The court found that:

Church peyote users believe that peyote is a sacred and powerful plant. Peyote is seen as a medicine, a protector, and a teacher. In terms used by other religions, peyote can be called a sacrament, something which when eaten gives awareness of God. The use of peyote is central to the Native American peyote religion. The religion teaches that those who use peyote must not use alcohol. It encourages love of parents and obedience to parents, fidelity to a spouse, and charity towards others. The peyote religion does not prohibit members from also practicing other religions.

Medical evidence, based on scientific studies and opinions of scientific and other experts, including medical doctors, former directors of the Indian Health Service and Anthropologists, clearly demonstrates peyote is not injurious to the Indian religious user, and, in fact, is often helpful in controlling alcoholism and alcohol abuse among Indian people. Ingested as a solid or tea in strictly prescribed and controlled religious ceremonies, the sacrament is neither addictive nor habit forming. Courts which have made factual findings regarding the religious use of peyote by Indians have concluded that such use is not harmful.

While the First Amendment right of Indian practitioners of the peyote religion is endangered by the *Smith* decision, its religious use is basically non-controversial. Attempts by the Congress to recognize and protect this right have a long history. When the House of Representatives passed H.R. 2, which became the "Drug Abuse Control Amendments of 1965", it protected the right of Indians to use peyote in connection with the ceremonies of a certified religious organization. The Senate omitted that specific protection, preferring that substances be included on such a list on a case-by-case basis. Congressman Harris assured House members that such omissions would not prevent bona fide religious use because courts had already upheld peyote use as a First Amendment right. The Administration then added peyote to Schedule I by administrative

regulation in 1966, but provided an exemption for non-drug use of peyote in religious ceremonies of the Native American Church.

When Congress passed the Controlled Substance Act of 1970, it enacted Schedule I into law. During hearings on the legislation, Congressman Satterfield expressed concern that the religious use of peyote by Indian practitioners be protected. The Administration assured him that this would be taken care of by regulation. The regulations, adopted in 1971 to implement the Act, provide at 21 CFR § 1307.31:

The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church.

Since that time, Native American Church use of peyote as a religious sacrament has had the limited protection of Federal regulation. Officials of the Drug Enforcement Administration of the Department of Justice testified at House hearings in 1993 and 1994 that the religious use of peyote by Indians has nothing to do with the vast and violent traffic in illegal narcotics that plagues this country. The DEA further testified that it is unaware of the diversion of peyote to any illicit market. The NAC has a good, cooperative relationship with the DEA in ensuring that peyote is lawfully harvested and distributed solely for American Indian religious use. The distribution of peyote is strictly controlled by Federal regulations, and by the laws and regulations of the State of Texas, the only State in which the sacrament grows in significant quantities.

In addition to the Federal regulatory exemption of the DEA, 28 States provide some degree of legal protection for the religious use of peyote by Indians. However, neither the Federal regulation nor the State laws provide the full range of protection needed for the unhindered religious use of peyote by Indians, and 22 States still have no legal protection at all. In some States, the legal protection for Indians is limited to the opportunity to assert the religious use of peyote as an affirmative defense in the context of felony prosecution. Thus, bona fide NAC members can be arrested, finger-printed, incarcerated and subjected to all the indignities of a felony prosecution before they can be vindicated and set free. Even then, they will have a criminal record—simply for practicing a bona fide religion that predates the founding of this country by some 10,000 years.

As a result of the diverse State laws governing the use of peyote, Indians in different tribes from different States, as well as from different tribes within some States, are treated differently regarding the traditional religious use of peyote.<sup>1</sup> NAC members who have

<sup>1</sup> For example, there are three Indian reservations in Nebraska where Native Americans reside: the Winnebago, Omaha and Santee Sioux. Nebraska state law does not provide for an exemption for the religious use of peyote by Indians. Therefore, Native American Church members transporting the sacrament to any of the three Nebraska reservations could be arrested, prosecuted and incarcerated if caught in possession of the sacrament anywhere in the state before they enter the reservation. As a result of Federal Indian policy and related jurisdictional matters, the State of Nebraska does not have criminal jurisdiction over the Winnebago or Omaha reservations, but does have such authority over the Santee Sioux Reservation. Thus, Omaha and Winnebago Indians may lawfully use peyote for religious purposes on their own reservations, because state law is not applicable there and such use is protected by the federal exemption of the DEA. However, Indians using the sacrament on the Santee Sioux Reservation could be prosecuted under state law since Nebraska criminal law is applicable at Santee and there is no state law exemption for the religious use of the sacrament. Such anomalous situations are not uncommon and underscore the need for a uniform national law that will provide American Indians with equal protection throughout the nation.

lawfully acquired the sacrament in Texas can still be arrested and subjected to felony prosecution and imprisonment in 22 States, States in which they may live or through which they must travel on their way home from Texas after lawfully acquiring the sacrament. This current State-by-State patchwork of laws has a chilling effect on the freedom of many Indian people to travel in this country and to practice their religion. Legislation is therefore needed to assure comprehensive, equal and uniform protection of the religious use of peyote by Indians throughout the United States, without regard to the State or reservation of residence, or tribal affiliation.

While 28 States do provide varying legal protections for the religious use of peyote by Indians, the U.S. Supreme Court ruled in 1990 in the *Smith* case that it is constitutionally permissible for States to prohibit such use. This legislation is made necessary by the *Smith* ruling.

#### THE SMITH DECISION AND RESTORATION OF THE COMPELLING GOVERNMENT INTEREST TEST

The *Smith* case began as an unemployment compensation dispute involving Alfred Smith, a Native American employee of a private drug and alcohol rehabilitation facility. Smith was fired and denied unemployment benefits after acknowledging he had ingested the peyote sacrament during a traditional religious ceremony of the Native American Church. The Oregon Employment Division believed that the State had a compelling interest in proscribing the use of certain drugs pursuant to a controlled substance law.

Smith filed a case disputing the denial of unemployment benefits and questioning the constitutionality of the controlled substance law as it applied to his religious practice. Following protracted litigation, the Oregon Supreme Court ruled that the prohibition on the sacramental use of peyote violated the free exercise clause of the First Amendment.

The U.S. Supreme Court reversed, holding that the free exercise clause of the First Amendment did not prohibit the State of Oregon from banning the sacramental use of peyote through its general criminal prohibition laws, or from denying unemployment benefits to persons dismissed from their jobs for such religiously inspired use. In an opinion written by Justice Scalia (joined by Chief Justice Rehnquist and Justices White, Stevens, and Kennedy), the Court discarded the long-standing compelling interest test, holding that facially neutral laws of general applicability that burden the free exercise of religion require no special justification to satisfy free exercise scrutiny.

Finally, the Court asserted that the free exercise of religion may be protected through the political process. According to the majority, its inability to find constitutional protection for religiously inspired action burdened by generally applicable laws does not mean statutory exemptions to such laws are not permitted or even desired. However, the majority noted:

It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that

unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weight the social importance of all laws against the centrality of all religious beliefs.<sup>2</sup>

To reach its decision, the majority had to strain its reading of the First Amendment and ignore years of precedent in which the compelling government interest test was applied in a variety of circumstances. In a strongly worded concurrence, Justice O'Connor took sharp issue with the Court's abandonment of the compelling government interest test. Justice O'Connor reviewed the Court's precedents and found that they confirmed that the compelling interest standard is the appropriate means to protect the religious liberty guaranteed by the First Amendment:

To say that a person's right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct. Under our established First Amendment jurisprudence, we have recognized that the freedom to act, unlike the freedom to believe, cannot be absolute. Instead, we have respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest.<sup>3</sup>

This controversial decision by a divided Court has been heavily criticized by constitutional law scholars, religious leaders, and civil libertarians. In 1993, Congress overturned portions of the *Smith* decision by enacting the Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. 103-141, 107 Stat 1488 (42 U.S.C. §§ 2000bb *et seq.*). However, RFRA left open the question of whether the reinstated compelling government interest test would provide adequate legal protection for the traditional religious use of peyote by American Indians—the precise religious practice at issue in *Smith*. As President Clinton emphasized when he signed the Religious Freedom Restoration Act on November 16, 1993:

The agenda for restoration of religious freedom in America will not be complete until traditional Native American religious practices have received the protection they deserve. My Administration has been and will continue to work actively with Native Americans and the Congress on legislation to address these concerns.

NEED FOR H.R. 4230 NOTWITHSTANDING THE RELIGIOUS FREEDOM  
RESTORATION ACT OF 1993

The Committee recognizes that H.R. 4230 remains necessary notwithstanding the recent enactment of the Religious Freedom Restoration Act of 1993. Justice O'Connor agreed with the judgment of the majority in *Smith* that Oregon's prohibition of the sacramental use of peyote was constitutionally permissible. However, she thought it unnecessary to discard the compelling government inter-

<sup>2</sup> 494 U.S. at 890.

<sup>3</sup> *Id.* at 894 (citations omitted).

est test in order to reach this result. Instead, Justice O'Connor would have retained and applied the traditional test to rule that the religious use of peyote by Indians is not protected by the first Amendment, since in her view the "State in this case has a compelling interest in regulating peyote use by its citizens— \* \* \*" <sup>4</sup> In Justice O'Connor's view, Oregon would have met the compelling government interest test solely on the judgment of the State legislature to list peyote as a Class 1 controlled substance, and notwithstanding factual considerations.

The Supreme Court's reliance on Oregon's position in *Smith* that the State has an interest in protecting the health and safety of its citizens from the "dangers" of peyote is highly questionable. As pointed out by Justice Blackmun in his dissent in *Smith*, Oregon's position "rests on no evidentiary foundation at all," and is therefore "entirely speculative". <sup>5</sup> As underscored by the dissent, the majority agreed with Oregon's assertion, notwithstanding that Oregon failed to offer any "evidence that the religious use of peyote has ever harmed anyone." <sup>6</sup> To the contrary, the record in *Smith* amply showed that: <sup>7</sup>

(1) Factual findings of other courts contradict Oregon's assumption that the religious use of peyote is harmful;

(2) Medical evidence, based on the opinion of scientists and other experts, including medical doctors and anthropologists, is that peyote is not injurious;

(3) The distribution and use of peyote has nothing to do with the vast and violent traffic in illegal narcotics that plagues this country;

(4) There is virtually no illegal trafficking in peyote—Drug Enforcement Administration (DEA) data indicates that between 1980 and 1987, only 19.4 pounds of peyote was confiscated, while during the same period the DEA seized over 15 million pounds of marijuana;

(5) The distribution of peyote is strictly controlled by Federal and Texas State regulations—the only State where peyote grows in significant quantities;

(6) The carefully circumscribed religious context in which peyote is used by Indians is far removed from the irresponsible and unrestricted recreational use of unlawful drugs, and is similar to the sacramental use of wine by the Roman Catholic Church, which was exempted from the general statutory ban on possession and use of alcohol during Prohibition;

(7) The Federal Government and 23 States [now 28] provide an exemption from respective drug laws for the religious use of peyote by American Indians;

(8) Native American Church doctrine forbids the non-religious use of peyote, and also advocates self-reliance, familial responsibility and abstinence from alcohol;

(9) Spiritual and social support provided by the Native American Church has been effective in combatting the tragic effects of alcoholism among the Native American population;

<sup>4</sup> 494 U.S. at 907.

<sup>5</sup> 494 U.S. at 911.

<sup>6</sup> 494 U.S. at 911-12.

<sup>7</sup> 494 U.S. at 911-18 for precise citations of the enumerated paragraphs.

(10) Oregon's assertion that granting a religious exemption for the use of peyote would open the floodgates to claims for the religious use of controlled substances by other religious denominations is not an issue because the Supreme Court and lower courts over the years have consistently rejected similar arguments in past free exercise cases, having held that the religious use of peyote by American Indians is the sole circumstance warranting claims for a religious exemption for any controlled substance; and

(11) granting a religious exemption solely for the sacramental use of peyote by American Indians presents no equal protection problems.

Notwithstanding the above-referenced record in *Smith*, Justice O'Connor felt Oregon had a compelling interest to prohibit the religious use of peyote, even though Oregon had never evinced a concrete interest in enforcing its drug laws against religious users of peyote—including Al Smith, the plaintiff in the *Smith* case. The committee recognizes that traditional Indian religions, including the peyote religion, are highly unique in nature and are little understood by the courts and other government officials. Given this backdrop, the Committee believes that the traditional religious use of the peyote sacrament by Indians requires statutory protection. H.R. 4230 responds to the Supreme Court's invitation in *Smith* to accommodate this ancient religious practice through the political process.

Absent Federal legislation, the question of whether a given State has a compelling interest to prohibit the religious use of peyote by Indians is one that would necessarily be determined by the courts on a State-by-State basis. The Committee recognizes that such determination could require numerous State supreme court decisions and a corresponding number of U.S. Supreme Court opinions—with varying results possible, as well as numerous lower State and Federal court decisions. Such piecemeal judicial resolution to this issue is not likely to produce uniform, just or equal results, and would be unduly burdensome, costly and time consuming. The Committee recognizes that uniform and equal protection of Indians without regard to State or reservation of residence, or tribal affiliation, can only be accomplished by Congress through comprehensive legislation.

#### CONSTITUTIONALITY

Since the creation of the United States, the treaty relationship between Indian tribes and the United States government has engendered a long-standing political relationship under the Constitution. This relationship includes a Federal trust responsibility for Indian tribes which has resulted in hundreds of separate Federal statutes dealing with all aspects of Indian life, including health, education, religion, economic development, children, employment, language and culture, gaming, and a host of other subject matter areas. An entire title of the United States Code (25 U.S.C.) is devoted exclusively to Indian legislation.

Because Indians and Indian tribes occupy a *sui generis* legal status in Federal law under the U.S. Constitution and enjoy a special political relationship with the United States Government, separate



Indian legislation has consistently been upheld by the U.S. Supreme Court under the legal principles set forth in *Morton v. Mancari*, 417 U.S. 535, 551-55 (1974). At the urging of the U.S. Department of Justice, the long-standing rationale for special Indian treatment by the Federal Government was recently applied by the Fifth Circuit Court of Appeals regarding the religious use of peyote in *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991). Finding that the Native American Church (NAC) members were also members of federally recognized tribes, the Fifth Circuit upheld the constitutionality of the DEA's protective regulation against an equal protection challenge:

We hold that the federal NAC exemption allowing tribal Native Americans to continue their centuries-old tradition of peyote use is rationally related to the legitimate governmental objective of preserving Native American culture. Such preservation is fundamental to the Federal Government's trust relationship with tribal Native Americans. Under *Morton*, [non-Indians] are not similarly situated to—NAC [members] for purposes of cultural preservation and thus, the Federal Government may exempt NAC members from statutes prohibiting possession of peyote without extending the exemption to [non-Indians].<sup>8</sup>

The Fifth Circuit also ruled that the DEA exemption for NAC members did not violate the establishment clause of the First Amendment:

The unique guardian-ward relationship between the Federal Government and Native American Indian tribes precludes the degree of separation of church and state ordinarily required by the First Amendment. The Federal Government cannot at once fulfill its constitutional role as protector of tribal Native Americans and apply conventional separatist understandings of the establishment clause to that relationship.

\* \* \* Thus, we hold that the Federal NAC exemption represents the Government's protection of the culture of quasi-sovereign Native American tribes and as such, does not represent an establishment of religion in contravention of the First Amendment.<sup>9</sup>

Based on the special relationship between the United States and federally recognized tribes, and on *Peyote Way Church of God*, the U.S. Department of Justice testified that Congress has the requisite authority to enact H.R. 4230, and that it is constitutionally sound. Accordingly, the Committee is confident that the granting of a statutory religious exemption for the sacramental use of peyote solely by American Indians presents no equal protection or establishment clause problems, and therefore stands on a solid constitutional footing.

<sup>8</sup>Id. at 1216.

<sup>9</sup>Id. at 1217.

## COMMITTEE AMENDMENT

The Committee Amendment to H.R. 4230 provides that Federal departments or agencies are not prohibited from promulgating regulations establishing reasonable time limitations on the use or ingestion of peyote prior to performance of official duties by active military personnel, sworn law enforcement officers, or personnel directly involved in public safety or safety-sensitive positions where the performance of such duties may be adversely affected by such use or ingestion. While the committee is unaware of any such problems in the past, it intends to accommodate prospective concerns articulated principally by the Department of Transportation and Department of Defense.

An official of the Native American Church testified at the June 10, 1994 hearing of the Native American Affairs Subcommittee that the effects of peyote do not persist more than 6 hours. The Committee recognizes the medical literature and related studies indicate that mescaline, the psychoactive component of peyote, may persist in the brain for up to 9 to 10 hours,<sup>10</sup> and that the physiological effects of peyote can last up to 12 hours.<sup>11</sup> The committee therefore deems a period of 6 to 24 hours to be "reasonable" as to authorized time limitations regarding the use or ingestion of peyote, pursuant to regulations the departments or agencies may promulgate under H.R. 4230. The committee further believes that, where an agency proposes a time limitation exceeding 24 hours, it should be prepared to show such limitation meets the balancing test set forth in the Religious Freedom Restoration Act. The Committee is confident that the bill and the 6 to 24 hour range for time limitations will adequately and amply meet the needs of affected departments, and will not adversely impact the ability of U.S. military personnel, law enforcement officers or persons directly involved in positions related to public safety to maintain good order, discipline, security and safety.

The Committee does not intend the act to impose requirements that would exacerbate the difficult and complex challenges of operating the Nation's prisons and jails in a safe and secure manner. Accordingly, the Committee does not intend the Act to require prison officials to either prescribe or proscribe the religious use of peyote by Indian inmates. Rather, the Committee expects that these matters will be addressed under the Religious Freedom Restoration Act of 1993, and that the courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary rules and procedures to maintain good order, security and discipline.

## SECTION-BY-SECTION ANALYSIS

## SECTION 1. SHORT TITLE

Section 1 provides that the Act may be cited as the "American Indian Religious Freedom Act Amendments of 1994".

<sup>10</sup> See e.g., Oakley and Ksir, "Drugs, Society and Human Behavior," Times Mirror/Mosby, St. Louis, 1990, pp. 309-311.

<sup>11</sup> See e.g., Dorrance, Janiger, and Teplitz, "Effect of Peyote on Human Chromosomes—Cytogenetic Study of the Huichol Indians of Northern Mexico," "Journal of the American Medical Association," Vol. 234, No. 3, October 20, 1975, pp. 299-302.

## SECTION 2. TRADITIONAL INDIAN RELIGIOUS USE OF THE PEYOTE SACRAMENT

Section 2 amends the American Indian Religious Freedom Act of 1978 by adding a new "Section 3" as follows:

Subsection (a) provides the findings of the Congress.

Subsection (b)(1) provides that the use, possession or transportation of peyote by an Indian for ceremonial purposes is lawful and is not to be prohibited by the United States or any State Government. It further provides that no Indian is to be penalized or discriminated against on the basis of the use, possession or transportation of peyote and benefits under public assistance programs are not to be denied.

Subsection (b)(2) provides that this section does not prohibit the regulation and registration by the Drug Enforcement Administration of persons who cultivate, harvest or distribute peyote under this Act.

Subsection (b)(3) provides that this section is not to impact a Texas law governing the growing and distribution of peyote.

Subsection (b)(4) provides that departments or agencies are not prohibited from promulgating regulations establishing reasonable time limitations on the use or ingestion of peyote prior to the performance of official duties by certain personnel. This subsection also provides that affected departments or agencies are not prohibited from establishing reasonable limitations on the transportation of peyote on military bases or overseas. The regulations are to be adopted only after consultation with representatives of traditional Indian religions for which the sacramental use of peyote is integral.

Subsection (c) provides for definitions for terms used in this section.

### LEGISLATIVE HISTORY

H.R. 4230 was introduced by Representatives Richardson on April 14, 1994. The Subcommittee on Native American Affairs held a hearing on H.R. 4230 on June 10, 1994. The Subcommittee considered and unanimously passed a substitute amendment to H.R. 4230, which was reported to the Committee on Natural Resources. On July 27, 1994, the Committee on Natural Resources considered H.R. 4230 and ordered it to be reported to the House with an amendment.

### COMMITTEE RECOMMENDATIONS

The Committee on Natural Resources, by voice vote, approved the bill with amendments and recommends its enactment by the House.

### CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

## SECTION 3 OF THE ACT OF AUGUST 11, 1978

### (POPULARLY KNOWN AS THE AMERICAN INDIAN RELIGIOUS FREEDOM ACT)

**SEC. 3. (a) The Congress finds and declares that—**

(1) for many Indian people, the traditional ceremonial use of the peyote cactus as a religious sacrament has for centuries been integral to a way of life, and significant in perpetuating Indian tribes and cultures;

(2) since 1965, this ceremonial use of peyote by Indians has been protected by Federal regulation;

(3) while at least 28 States have enacted laws which are similar to, or are in conformance with, the Federal regulation which protects the ceremonial use of peyote by Indian religious practitioners, 22 States have not done so, and this lack of uniformity has created hardship for Indian people who participate in such religious ceremonies;

(4) the Supreme Court of the United States, in the case of *Employment Division v. Smith*, 494 U.S. 872 (1990), held that the First Amendment does not protect Indian practitioners who use peyote in Indian religious ceremonies, and also raised uncertainty whether this religious practice would be protected under the compelling State interest standard; and

(5) the lack of adequate and clear legal protection for the religious use of peyote by Indians may serve to stigmatize and marginalize Indian tribes and cultures, and increase the risk that they will be exposed to discriminatory treatment.

(b)(1) Notwithstanding any other provision of law, the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion is lawful, and shall not be prohibited by the United States or any State. No Indian shall be penalized or discriminated against on the basis of such use, possession or transportation, including, but not limited to, denial of otherwise applicable benefits under public assistance programs.

(2) This section does not prohibit such reasonable regulation and registration by the Drug Enforcement Administration of those persons who cultivate, harvest, or distribute peyote as may be consistent with the purposes of this Act.

(3) This section does not prohibit application of the provisions of section 481.111(a) of Vernon's Texas Health and Safety Code Annotated, in effect on the date of enactment of this section, insofar as those provisions pertain to the cultivation, harvest, and distribution of peyote.

(4) Nothing in this section shall prohibit any Federal department or agency, in carrying out its statutory responsibilities and functions, from promulgating regulations establishing reasonable time limitations on the use or ingestion of peyote prior to performance of official duties by active duty military personnel, sworn law enforcement officers, or personnel directly involved in public transportation or any other safety-sensitive positions where the performance of such duties may be adversely affected by such use or ingestion, nor shall this section prohibit affected departments or agencies from establishing reasonable limitations on the transportation of peyote on

*military bases or overseas. Such regulations shall be adopted only after consultation with representatives of traditional Indian religions for which the sacramental use of peyote is integral to their practice. Any regulation promulgated pursuant to this section shall be subject to the balancing test set forth in section 3 of the Religious Freedom Restoration Act (Public Law 103-141; 42 U.S.C. 2000bb-1).*

*(c) For purposes of this section—*

*(1) the term "Indian" means a member of an Indian tribe;*

*(2) the term "Indian tribe" means any tribe, band, nation, pueblo, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.)), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;*

*(3) the term "Indian religion" means any religion—*

*(A) which is practiced by Indians, and*

*(B) the origin and interpretation of which is from within a traditional Indian culture or community; and*

*(4) the term "State" means any State of the United States, and any political subdivision thereof.*

*(d) Nothing in this section shall be construed as abrogating, diminishing, or otherwise affecting—*

*(1) the inherent rights of any Indian tribe;*

*(2) the rights, express or implicit, of any Indian tribe which exist under treaties, executive orders, and laws of the United States;*

*(3) the inherent right of Indians to practice their religions; and*

*(4) the right of Indians to practice their religions under any Federal or State law.*

#### OVERSIGHT STATEMENT

The Committee on Natural Resources will have continuing responsibility for oversight of the implementation of H.R. 4230 after enactment. No reports or recommendations were received pursuant to rule X, clause 2 of the rules of the House of Representatives.

#### INFLATIONARY IMPACT STATEMENT

Enactment of H.R. 4230 will have no inflationary impact.

#### COST AND BUDGET ACT COMPLIANCE

The cost and budgetary analysis of H.R. 4230, as evaluated by the Congressional Budget Office is set forth below:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
Washington, DC, August 3, 1994.

Hon. GEORGE MILLER,  
Chairman, Committee on Natural Resources,  
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 4230, the American Indian Religious Freedom Act Amendments of 1994, as ordered reported by the House Committee on Natural Resources on July 27, 1994. We estimate the implementation of the bill would have no effect on the Federal budget or on the budgets of State or local governments. Enactment of H.R. 4230 would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to this bill.

H.R. 4230 would amend the American Indian Religious Freedom Act of 1978 by adding a new section that would permit the use, possession, or transportation of peyote by Indians for sacramental purposes. However, the bill would not prohibit the Drug Enforcement Administration from regulating peyote cultivation or distribution, nor would it prohibit Federal agencies from regulating peyote use by certain types of Federal personnel prior to performing their official duties.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Rachel A. Robertson.

Sincerely,

JAMES T. BLUM,  
(For Robert D. Reischauer).

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U.S. DEPARTMENT OF JUSTICE,  
DRUG ENFORCEMENT ADMINISTRATION,  
Washington, DC, August 3, 1994.

Mr. TADD JOHNSON,  
Chief Counsel, Subcommittee on Native American Affairs, House of  
Representatives, Washington, DC.

DEAR MR. JOHNSON: It is my understanding that H.R. 4230, "American Indian Religious Freedom Act of 1994", is nearing floor consideration in the House. You will recall that while the Drug Enforcement Administration (DEA) was unable to have a witness at your hearing regarding this matter on June 10, 1994, that we did submit a statement for the record. That statement succinctly puts forth the history of DEA's regulation of peyote and the exemption for its use in traditional Native American ceremonies. DEA has encountered no problems with the use of peyote in these traditional ceremonies nor has diversion of peyote been a problem.

DEA has had a long and cooperative association with the Native American Church, working with them since the early 1970's to assure that our mutual concerns relating to peyote are met. We have worked with its representatives to assure that the bill language effectively addresses these matters. DEA supports the passage of H.R. 4230 as it was reported by the Committee on Natural Resources with the amendments that address public safety concerns.

If I can provide you with any other information pertaining to DEA's experience regarding peyote, please let me know.

Sincerely,

DAVID A. MELOCIK,  
DEA, Congressional Affairs.

STATEMENT OF GENE R. HAISLIP, DEPUTY ASSISTANT ADMINISTRATOR, OFFICE OF DIVERSION CONTROL, DRUG ENFORCEMENT ADMINISTRATION

*Chairman Richardson and Members of the Subcommittee:*

The Drug Enforcement Administration (DEA) appreciates the opportunity to comment regarding H.R. 4230 "American Indian Religious Freedom Act of 1994." This bill seeks to statutorily provide for the traditional use of peyote by Indians for religious purposes.

Almost 25 years ago when Congress began hearings pertaining to the Controlled Substances Act (CSA) they decided that the traditional, historic use of peyote by members of the Native American Church (NAC) as a sacrament in traditional religious ceremonies warranted a specific exemption. Congress determined, to be consistent with past Federal practice, this exemption should be specified in regulation rather in law. Consequently, an exception was created for the NAC to use peyote for religious purposes. Although the NAC is not defined in the subject regulations, the members of this church are required to be Native American.

The regulation has worked very well for both DEA and the NAC with only minor difficulties from time to time concerning the natural supply of the drug and the difficulties obtaining peyote outside of the area where it grows locally. In fact, our experience over the years in enforcing this regulation has revealed no particular problems of abuse of this substance by the NAC or its members. Unfortunately there will always be individuals who seek to circumvent the regulations for their own purposes and on occasion, DEA has dealt with groups who have attempted to expand the exemption to authorize the use of peyote or other controlled substances in what they claimed to be religious ceremonies.

On occasion, peyote, whose primary active ingredient is mescaline, a hallucinogen similar to LSD, has been found in the illicit traffic. It has not been reported by DEA, State or local enforcement agencies to be anything other than a sporadic problem. Despite the fact that the regulation allows for the legal use of the drug and the registration of legitimate distributors, DEA at this time is not aware of the diversion of the drug to any illicit market.

Although we at DEA feel that the regulation that has been in place for almost 25 years has worked well, we would prefer a statutory exemption over an administrative exemption. We have reviewed H.R. 4230 and could support the bill if amended to: (1) restrict the use, possession, or transportation of peyote to bona fide traditional ceremonial purposes only; and (2) to make clarifying amendments to address public safety concerns.

DEA and the NAC have maintained a close working relationship to allow the use of peyote for religious ceremony without diversion or abuse. DEA believes the passage of this legislation will serve to

strengthen the uniform application throughout all of the states without reprisal to NAC members of this religious exception.

Mr. Chairman, this concludes my statement. I will be pleased to answer any questions that you may have.

